

UNITED STATES OF AMERICA
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

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In the Matter of Rules and	:	
Regulations Implementing the	:	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991:	:	
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**COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION ON
THE COMMISSION’S FURTHER NOTICE OF PROPOSED RULEMAKING
REGARDING POSSIBLE AMENDMENTS TO RULES IMPLEMENTING
THE TELEPHONE CONSUMER PROTECTION ACT**

The Electronic Retailing Association (“ERA”) is the leading trade association representing the electronic retailing industry. Its mission is to foster the use of various forms of electronic media – television, Internet, telephone, radio – to promote goods and services to consumers. The ERA has over 450 member organizations encompassing a wide range of entities, such as advertising agencies, direct response marketers, telemarketers, Internet and “brick and mortar” retailers, fulfillment service providers and television shopping channels.

The ERA is submitting these comments in response to the Commission’s Further Notice of Proposed Rulemaking (“NPRM”), 68 F.R. 16250-01 (April 3, 2003), in which it requested comment on how, in the context of this rulemaking proceeding, it might maximize consistency with the national do not call (“DNC”) registry to be implemented pursuant to the Federal Trade Commission’s (“FTC”) recently amended Telemarketing Sales Rule, 16 C.F.R. §§ 310.4(b) (the “Amended TSR”).

As a preliminary matter, we reiterate our belief that a national DNC registry is unwarranted and that the company specific DNC list requirement contained in the Commission's current rules implementing the Telephone Consumer Protection Act, 47 C.F.R. § 64.1200 (the "TCPA Rules"), strike the proper balance between the desire of consumers to limit certain unwanted telephone solicitations (but still receive desirable ones) and the needs of marketers to effectively and efficiently contact existing and prospective customers via the telephone marketing channel. Nevertheless, in the event that the Commission determines that a national DNC list is appropriate, we believe that it is critical that any changes to the TCPA Rules relating to the implementation and/or enforcement of such a national DNC list be consistent with the FTC's Amended TSR and the upcoming implementation of its national DNC registry (hereinafter, the "FTC list").

In the Statement of Basis and Purpose accompanying its Amended TSR, the FTC stated an intention to work with the Commission, and those states that have enacted DNC registry laws, to move toward a single, harmonized registry system with a single set of compliance obligations. See 68 F.R. 4580 (January 29, 2003). The ERA favors this approach and believes that any effort by the Commission to implement a national DNC registry must involve the creation of a single national DNC registry system that harmonizes the myriad different requirements, exemptions, enforcement mechanisms and other legal requirements contained within these various other DNC schemes.

In its earlier NPRM regarding possible revisions to its TCPA Rules, the Commission suggested that a national DNC list might be less burdensome to telemarketers than the current TCPA Rules' company-specific approach. 67 F.R. 62667 (October 8, 2002). As noted in our earlier comments, however, the ERA believes that

without the harmonization of any Commission list with the FTC list and various state lists in a single national list, these perceived efficiencies or benefits will not be achieved.

Indeed, without such harmonization, telemarketers would potentially be faced with the extraordinary burden of having to comply with two distinct national lists and an ever-growing number of state lists. Rather than creating efficiencies, any Commission DNC list proposal that does not call for the creation of a single, harmonized national DNC list would simply add to this administrative burden by becoming yet another list with which telemarketers would be required to comply.

The ERA believes that a workable harmonization scheme would involve a single national DNC list (incorporating the Commission list, the FTC List and the various state DNC lists) with uniform exemptions, safe harbors and regulations applicable to all interstate telemarketing calls. In order to achieve this result, the Commission would have to work with the FTC to address differences between the TCPA Rules and the Amended TSR, for example with respect to the definition of an established business relationship.¹

Those states with DNC legislation containing more or less restrictive requirements and enforcement schemes would remain able to apply those standards to intrastate calls conducted within their states and would also have the ability to enforce the

¹ Under the Commission's current TCPA Rules an established business relationship is a "prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." Under the FTC's Amended TSR, an established business relationship means "a relationship between a seller and a consumer based on (i) the consumer's purchase, rental or lease of the seller's goods or services or a financial transaction between the consumer and seller, within eighteen (18) months immediately preceding the date of a telemarketing call; or (ii) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call." Any harmonized national DNC list should have a single established business relationship exemption and definition applicable to all interstate calls.

national DNC list and federal standards with respect to interstate calls made into or out of their states. This would be consistent with the mandate of the TCPA that any Commission DNC list “be designed to enable States to use the [DNC] database mechanism selected by the Commission for purposes of administering or enforcing State law.” 47 U.S.C. § 227(c)(3)(J).

Moreover, as the Commission itself noted in its initial NPRM, state Attorneys General have taken the position that they have the authority to (and, indeed, actively attempt to) enforce their DNC lists and other telemarketing requirements against interstate calls. As noted in our earlier comments, the ERA does not believe that the states have the legal authority to enforce their state-based DNC list requirements against interstate telemarketing calls and that the jurisdiction of the state-based DNC lists is legally limited to intrastate calls. Implementation of the harmonization scheme set forth above would serve to clarify this issue and create a single, uniform set of compliance standards for all interstate calls.

Respectfully Submitted:

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